SUPREME COURT

IN THE

Supreme Court of the United States

October Term, 1970

No. 71-14

H. BOYD EDWARDS, JR.,

Petitioner,

v.

NANCY EDWARDS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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August 3, 1971

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RESTATEMENT OF QUESTION PRESENTED

The question presented is whether the granting of a default divorce at a hearing held without notice to petitioner was a denial of due process of law under the Fourteenth Amendment, where:

(a) Petitioner had received proper notice of the commencement of the Colorado divorce proceedings;

(b) Petitioner had elected to default himself in the Colorado proceedings; and

(c) The divorce decree acted only upon the marital status of the parties.

Petitioner's assertions of "facts" in subparagraphs (a), (b) and (c) of his Question Presented are refuted expressly by the findings of the Colorado trial court and the Colorado Court of Appeals.

SUPPLEMENTAL STATEMENT OF THE CASE

For convenience and accuracy of reference, the petitioner shall be referred to as "Edwards" and the respondent, formerly Nancy C. Edwards, now Mrs. Nancy C. Oden, will be referred to as "Mrs. Oden".

The roots of marital discord were present long before July, 1964 when Mrs. Oden moved her domicile to Colorado. Edwards had committed acts of physical violence against her, failed to file federal income tax returns for the years 1958, 1959 and 1960, and had failed to support his family in New Jersey. Edwards' return of the children to New Jersey in 1965 was accomplished without the consent of Mrs. Oden or the wish of the children; rather it was done by a ruse.

Mrs. Oden did inform Edwards that she was going to Chicago on February 22, 1967 because she was taking the children there to visit their maternal grandmother, Mrs. J. Beach Clow.

It should be noted that, in addition to his attack on the Colorado divorce proceeding, Edwards has initiated actions in New Jersey for custody of his children — he was unsuccessful at the trial level and upon appeal; to restrain permanently Mrs. Oden from proceeding to determine the parties' marital status in Colorado — he was unsuccessful at the trial level and upon appeal; and an action to determine the parties' property rights — which was settled.

ARGUMENT AGAINST GRANTING WRIT

Petitioner misapprehends the principles of due process of law.

Edwards was served personally in New Jersey with a copy of the summons and complaint filed in the Colorado divorce action. The complaint sought only to terminate the parties' marital status. No relief whatsoever of an *in personam* nature was sought. Rule 4(c), Colorado Rules of Civil Procedure provides:

> "(c) *Contents of Summons.* The summons shall contain the name of the court, the names or designation of the parties to the action, the county in which it is brought, be directed to the defendant, *state the time within which the defendant is required to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him....*"
>
> (Emphasis added.).

The summons in Edwards provided that the defendant had 30 days in which to file an answer to the complaint. More than nine (9) months elapsed without Edwards taking any action in Colorado. He made no appearance during that period to contest the jurisdiction of the Colorado court by a motion pursuant to Rule 12 (b), R.C.P. Colo.; he did not seek an abatement of the Colorado action pending conclusion of the New Jersey injunction suit. At all times he was represented by competent New Jersey counsel but at no time did he notify the Colorado courts, Mrs. Oden or Mrs. Oden's counsel in either New Jersey or Colorado that he intended to appear and defend in Colorado. Neither Mrs. Oden nor her counsel in either New Jersey or Colorado

were required to perceive or presume what Edwards might do next.

The essence of Edwards' position is that Mrs. Oden had an obligation to protect him from the results of his own conduct.

No case cited by petitioner extends the due process mandate to the point herein sought. Unlike *Armstrong v. Manzo*, 380 U.S. 545 (1965), Edwards had full knowledge of the pendency of the proceedings. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) a published notice was inadequate when the Trust Company had means of providing more adequate notice to its beneficiaries. *Griffin v. Griffin*, 327 U.S. 220 (1946) resulted in an *in personam* judgment of alimony arrearage entered without notice when the defendant had appeared previously in the matrimonial action. *Grannis v. Ordean*, 234 U.S. 385 (1914) related to adequacy of a published notice in a foreclosure proceeding where the defendant's name was misspelled.

The *Mullane* case, *ibid.*, does set forth criteria relating to notice requirements. The notice is to be appropriate to the nature of the case. It must be of such nature as reasonably to convey the required information so that a party may decide whether to appear or default, acquiesce or contest. It must afford a reasonable time for an interested party to appear.

Examining these criteria in the light of the instant case, the record shows the following:

a. Edwards was served personally at his New Jersey residence with a copy of the summons and complaint in the Colorado divorce action.

b. The summons directed that an answer be filed by Edwards within thirty (30) days after service of the summons

with the Clerk of the District Court in and for the County of Pitkin, State of Colorado else judgment be taken against him for the relief sought in the complaint.

c. A copy of the complaint was served with the summons upon Edwards. The only relief sought was that the plaintiff be granted a divorce from the defendant Edwards.

The doctrine of due process relative to divorce has its beginnings in dictum in *Pennoyer v. Neff*, 95 U.S. 714 (1877) where the court indicated that a state might authorize proceedings to determine status of one of its citizens toward a non-resident through substituted service of process (*sic.* publication) upon the non-resident.

It is clear that the distinguishing feature in the matrimonial due process cases is whether marital status alone is acted upon, or whether other "precious" personal rights or property rights are made the subject of the judgment. The full faith and credit extended to the Nevada decree in *Williams v. North Carolina (I)*, 317 U.S. 287 (1942) was buttressed upon the fact that only the status of the marriage was acted upon by the Nevada court. *Estin v. Estin*, 334 U.S. 541 (1948) struck down that portion of the decree affecting alimony due to lack of personal service, but affirmed the trial court's grant of a divorce. In *Simons v. Miami Beach First National Bank*, 381 U.S. 81 (1965) the Court permitted a Florida court to terminate the dower right of a New York resident who was served only by substituted process (publication).

Edwards' argument repeats the fiction of Mrs. Oden's deceit and his reliance upon it; her violation of an injunction and his reliance upon her compliance with it. The record reflects his assertion that he had "no faith in her doing what she said she was going to do". Edwards at all times elected to act towards the Colorado court at his peril. Mrs. Oden

possessed the capability to defy the New Jersey restraining order and obtain her valid Colorado decree of divorce long prior to February 23, 1967.

Procedural due process protects life, liberty and property. It also protects certain "precious" personal rights arising through the matrimonial state as reflected by *May v. Anderson*, 345 U.S. 528 (1953) and *Armstrong v. Manzo, supra.* The termination of the Edwards' marriage did not deny him a tangible, valuable right. He was in nowise prejudiced by the divorce. There is no way he can force Mrs. Oden to be his chattel. There was, and is, no mandate which can compel Mrs. Oden to love, cherish, honor and obey this creature who for seven years has utilized the legal system of this nation in every forum available to him to sadistically attack her.

The rationale of *Estin, supra,* is applicable here. Remarriage of the respondent has occurred based upon the Colorado decree (1967). A child of Dr. and Mrs. Oden's marriage was born a year later.

CONCLUSION

Edwards knew of the pendency of the Colorado divorce action; he opted to determine the validity of Mrs. Oden's Colorado domicile in New Jersey rather than in Colorado; he elected to default himself in the Colorado proceeding. At all times he exercised a freedom of choice as to the forum in which to fight his battle; he could have fought on two fronts simultaneously; the decision was his. There is no denial of due process just because one makes an improper judgment.

It is submitted that the decisions of the courts of Colorado are in accord with the applicable decisions of this Court and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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